

**AHMED EL BALGUITI**  
Claimant

**MARRIOTT HOTEL**

Respondent

**ARGONAUT INSURANCE COMPANY**

Insurance Carrier

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

The record consisting of that listed in the original Award of July 14, 1994, was considered by the Appeals Board for the purpose of this review and modification. In addition, the Appeals Board considered the following records: the preliminary hearing transcript held February 15, 1996; the transcript of proceedings dated May 30, 1996; the deposition of G. R. Wurster, M.D. taken March 11, 1996; the deposition of Lowry Jones, Jr., M.D., taken May 21, 1996; and the deposition of Jorge Gandolfo, M.D., taken on April 30, 1996. An objection to the deposition of Dr. Gandolfo had earlier been raised by

respondent but, at the time of oral argument, respondent advised that its objection had been withdrawn.

### **ISSUES**

- (1) The nature and extent of claimant's injury and/or disability subsequent to the filing of the Application for Review and Modification.
- (2) Claimant's entitlement to past and future medical treatment.
- (3) Whether the respondent was ordered to pay for medical treatment not related to claimant's accidental injury.
- (4) Claimant's entitlement to penalties.
- (5) Claimant's entitlement to post award attorney fees.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

This matter was originally decided by Administrative Law Judge Robert H. Foerschler on July 14, 1994, when the Administrative Law Judge awarded the claimant a 60 percent permanent partial general body disability. That Award was modified by the Appeals Board in its decision of July 17, 1995, which increased claimant's permanent partial disability award to 67 percent to the body as a whole. Claimant filed his Application for Review and Modification on January 2, 1996, alleging that he was permanently and totally disabled from any type of substantial and gainful employment. The Administrative Law Judge, in the August 23, 1996, Review and Modification award found claimant to have been rendered totally incapable of gainful employment "notwithstanding Dr. Wurster's optimistic suggestions that some work would be good for him."

The Administrative Law Judge went on to say, "By the same token, his hazardous past experiences in his home country may also be contributing to aggravating his present condition, but no employer can expect to employ perfect people, and each employer must accept the risks that come along with each individual employee." (Citations omitted.)

In computing the award, the Administrative Law Judge went on to find claimant 100 percent permanently partially disabled, granting him an award of \$52,244.75. The Administrative Law Judge also found that as of May 21, 1996, when considering the opinion of Dr. Jones, claimant was incapable of engaging in substantial gainful employment.

The Award is somewhat confusing in that it eludes on two separate occasions to claimant being totally incapable of gainful employment and then awards claimant a 100 percent permanent partial general body disability rather than permanent total disability. Part of the confusion stems from the fact claimant may or may not have Parkinson's syndrome which may produce the tremors diagnosed by several of the treating physicians. Dr. Jones felt that claimant suffered from intention tremors which he related as a psychological response to the assault suffered by claimant on September 7, 1990, when he was shot in both legs during a robbery at the respondent's Marriott Hotel. Dr. Gandolfo felt that claimant suffered from post-traumatic stress disorder and major reoccurrence depression which he diagnosed as being chronic from the time of the assault. He felt the tremors were independent from the post-traumatic stress disorder. Dr. Wurster, a psychiatrist, felt claimant suffered from major depression, mild symptoms of post-traumatic stress disorder which developed after the injury, and hypersensitivity due to his pain syndrome. He went on to state claimant was socially withdrawn. He felt claimant had a continuing need for psychiatric treatment and was not likely to improve.

Claimant testified that his condition had worsened considerably since the time of the original Award. He suffered from both physical pain which had intensified considerably and a decreased ability to function in performing the simplest of daily tasks. Dr. Gandolfo, a practicing physiatrist, felt claimant was unemployable as a result of the injury, post-traumatic stress disorder, and current major depression. He felt these conditions resulted from the injuries suffered on September 7, 1990. Dr. Wurster felt claimant to be permanently totally disabled as a result of the major depression and chronic pain syndrome, both precipitated by his on-the-job injury. Dr. Jones felt claimant was unemployable for a multitude of reasons.

There was a discrepancy in the medical testimony as to whether claimant suffered from spinal stenosis or Parkinson's disease. The record was not convincing as to whether claimant's Parkinson's disease or spinal stenosis, if indeed he suffered from either, were in any way aggravated by the injuries or the subsequent debilitating conditions suffered by claimant. The more persuasive evidence indicated that the Parkinson's disease and spinal stenosis suffered by claimant were not connected to or in any way aggravated by the injury of September 7, 1990, or the subsequent impairment resulting therefrom. As such, the Appeals Board finds any medical treatment provided to claimant for his Parkinson's disease and spinal stenosis would not be related to an injury arising out of and in the course of his employment. Any treatment paid for by respondent for these conditions should be reimbursed to the respondent by the Kansas Workers Compensation Fund.

K.S.A. 1990 Supp. 44-510c(a)(2) defines permanent total disability compensation as follows:

"Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The term “substantial and gainful employment” has not been defined in the Kansas Workers Compensation Act. Until recently, the Kansas Appellate Court had likewise not provided a definition. However, a recent case of the Kansas Court of Appeals, Wardlow v. ANR Freight Systems, 19 Kan. App. 2d. 110, 872 P.2d 299 (1993), held:

“The trial court’s finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with the legislative intent.”

Dr. Jones found that claimant was incapable of being engaged in substantial and gainful employment. Dr. Gandolfo testified claimant was unemployable at the current time. Dr. Wurster, originally optimistic regarding claimant’s ability to return to work, found recently that claimant had worsened and he saw little or no hope for employment. The Administrative Law Judge noted Dr. Wurster’s optimistic suggestions that some work might be good for claimant; but the Appeals Board finds, nevertheless, the weight of credible medical evidence establishes that claimant has been rendered permanently and totally incapable of engaging in any type of substantial and gainful employment.

The Appeals Board’s function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with testimony of claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991) The preponderance of the credible evidence in this case supports a finding that claimant is permanently and totally incapable of substantial and gainful employment and is entitled to an award of permanent total disability.

Claimant is further awarded compensation for both past medical treatment and future medical treatment with the exception of any medical care provided for claimant’s Parkinson’s disease and spinal stenosis.

Claimant alleges in his brief that his Application for Review and Modification was filed December 30, 1995. The Application contained in the Director’s file indicates the Application was actually filed with the Director’s office on January 2, 1996. K.S.A. 1990 Supp. 44-528(d) states:

“Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.”

As such, the Appeals Board finds claimant’s Application for Review and Modification filed January 2, 1996, results in an effective date of July 2, 1995.

The Administrative Law Judge in the Review and Modification assessed no penalties against respondent for its failure to pay certain medical bills. A review of the record finds much confusion regarding what medical bills were in dispute. It was stipulated at oral argument before the Appeals Board that all medical bills, including those related to the spinal stenosis and Parkinson's disease, had been paid. As such, the Appeals Board finds no penalties appropriate.

The Award by the Administrative Law Judge of \$255 in attorney fees pursuant to K.S.A. 44-536 stems from claimant's attorney's post-award pursuit of payment of these medical bills. As this constituted an action separate and distinct from the review and modification for claimant's assessment of permanent total disability, the Appeals Board finds that an award of attorney fees under K.S.A. 44-536 is appropriate. As such, the Award to claimant and his attorney of \$255 comprising of three hours of work at \$85 per hour is affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Review and Modification entered by Administrative Law Judge Robert H. Foerschler dated August 23, 1996, should be, and is hereby, modified and an award is granted in favor of the claimant, Ahmed El Balguit, and against respondent, Marriott Hotel, and its insurance company, Argonaut Insurance Company, for a permanent total general body disability.

Claimant is entitled to 131.71 weeks of temporary total disability and temporary partial disability compensation, totaling \$16,059.09 as stipulated by the parties, followed by 119.43 weeks of permanent partial disability compensation at the rate of \$109.73, totaling \$13,105.05, followed by 585.19 weeks of permanent total disability compensation at the rate of \$163.77, for a total award not to exceed \$125,000.

As of February 24, 1997, there is due and owing claimant 131.71 weeks of temporary total and temporary partial disability compensation in the amount of \$16,059.09 as stipulated, followed by 119.43 weeks of permanent partial disability compensation at the rate of \$109.73 per week in the sum of \$13,105.05, followed by 86.29 weeks of permanent total disability compensation at the rate of \$163.77 in the amount of \$14,131.71, making a total due and owing of \$43,295.85, which is ordered paid in one lump sum less any amounts previously paid. Thereafter claimant is entitled to compensation at the rate of \$163.77 per week until the total award of \$125,000.00 has been paid or until further order of the Director.

The necessary medication for claimant's ongoing symptoms, excluding claimant's Parkinson's disease and spinal stenosis, shall be furnished and paid for by respondent as part of claimant's future medical compensation.

The pool therapy, recommended by St. Luke's Management Plan in December 1995, shall be compensable if same is not connected with the treatment for claimant's Parkinson's disease or spinal stenosis.

Additional orders or awards contained in the Review and Modification of the Administrative Law Judge dated August 23, 1996, remain in full force and effect to the extent they are not in contravention to the opinions expressed herein.

An award of attorney fees to claimant's attorney for three hours of service at \$85 per hour totaling \$255 is granted pursuant to K.S.A. 44-536.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Topeka, KS  
Robert D. Benham, Kansas City, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director